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No. 04-480

IN THE

Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS INC., ET AL.,

Petitioners,

v.

GROKSTER, LTD., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Is a company that deliberately designs a product for the specific purpose of enabling massive infringements of copyright by millions of people worldwide—and then encourages, facilitates and profits from the resulting infringement—immune from ordinary principles of secondary tort liability on the theory that a small percentage of people happen to use its product lawfully?

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BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Defenders of Property Rights ("Defenders"), as *amicus curiae*, respectfully submits that the judgment below should be reversed.[1]

INTEREST OF *AMICUS CURIAE*

Defenders is a national non-profit, public interest legal foundation dedicated to the protection of constitutionally protected rights in property. Defenders' mission is to protect those rights considered essential by the Framers of the Constitution and to promote a better understanding of the relationship between private property rights and individual liberty. To that end, Defenders advocates for protection of private property rights in Congress and state and local legislatures.

Defenders also litigates cases and files *amicus curiae* briefs on behalf of its members and the public interest in this and other courts to defend the property rights of private citizens against governmental and other incursions. Since its founding in 1991, Defenders has participated in every significant property rights case in this Court including *Orff v. United States*, No. 03-1566; *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Phillips v. Washington Legal Found.*, 524 U.S. 156

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[1] Pursuant to this Court's Rule 37.6, *amicus* Defenders states that no counsel for a party authored this brief in whole or in part. The Recording Industry Association of America ("RIAA") and the Motion Picture Association of America, Inc. ("MPAA") have provided monetary contributions to fund the preparation and submission of this brief. Although neither RIAA nor MPAA is a party to this litigation, many of their constituent members are. All parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk.

(1998); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Bennett v. Spear*, 520 U.S. 154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

This case concerns the intellectual property rights of artists, authors, composers, software developers, and all other creators and owners of copyrighted works. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (endorsing "a notion of 'property' that extends beyond land and tangible goods and includes the products of an individual's 'labour and invention'") (quoting 2 W. Blackstone, *Commentaries* *405).

Defenders has a strong interest in ensuring that these intellectual property rights remain meaningful and protected in the digital age.

STATEMENT

This case involves one of the biggest lootings of private property in history. Respondents distribute, to hundreds of thousands of people each week, tools designed to enable theft on a massive and unprecedented scale. Respondents have built a business on copyright infringement. Their profits depend on facilitating this theft, and every day millions of people worldwide use these tools to break the law and steal Petitioners' property.

The tools in question are Respondents' peer-to-peer file sharing services, which enable users to make illegal copies of copyrighted musical works and motion pictures owned by Petitioners. Although Respondents designed the services for this exact purpose—although they profit in direct proportion to the amount of unlawful copying their services enable—and although infringement constitutes at least 90 percent of the services' activity—Respondents claim that they are beyond the reach of the law because *some* people may actually use their services in a lawful manner.

The Ninth Circuit found this argument persuasive. Invoking this Court's decision in *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the court held that because Respondents' services were "*capable* of substantial non-infringing uses," Pet. App. 12a (emphasis added), Respondents could be held liable for contributory copyright infringement only if they "had specific knowledge of infringement at a time at which they contribute[d] to the infringement and fail[ed] to act upon that information." *Id.* at 13a. The court then concluded that because Petitioners' notices of infringement arrived too late—at a time when Respondents "cannot do anything to stop" the intended consequence of the product they unleashed—Respondents could not be held secondarily liable and made to halt the millions of infringements that continue to occur each day. *Id.*

Under the Ninth Circuit's reasoning, an individual who markets and sells burglary tools, and counsels customers on how to use the tools to break into homes, would not be liable on the theory that some customers might use the tools to break into their *own* houses if they misplace their keys—or the houses of their friends who give them permission.

The Ninth Circuit's decision eviscerates intellectual property rights. It frustrates those who have invested substantial resources in creating an original work, only to see the fruits of their labors snatched away. It rewards those, like Respondents, who unjustly profit by designing tools to enable the theft of private property. And it stifles innovation by depriving citizens of the incentive to create works of art or music or literature that can be enjoyed by people ages hence.

If left uncorrected, the decision below—in the short term—will deny creators and artists the financial benefits that are rightfully theirs. But in the long term, the costs will fall on society as a whole in the form of songs and movies that are *not* created, precisely because the law (as the Ninth Circuit sees it) will not protect and reward their investments of time and money. The decision below thwarts the "basic purpose" and "ultimate aim" of the Copyright Act: to "secure a

fair return for an author's creative labor" and "by this incentive, to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (internal quotation marks omitted).

Respondents' services—and their false assertions that what they do is legal—have spawned a culture of infringement that leads millions of people who would not dream of stealing a compact disc or DVD from a store to rationalize the unlawful downloading of copyrighted works. The sheer scale of the problem makes lawsuits against direct infringers a "teaspoon solution to an ocean problem." Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 Antitrust Bull. 423, 442 (2002). Copyright owners could bankrupt themselves filing John Doe lawsuits against anonymous users of Respondents' infringement networks (many of whom are judgment-proof) and not even put a dent in the problem—particularly given the hundreds of thousands of individuals who join these networks each month.

A strong rule of secondary liability for copyright infringement is therefore vital to safeguarding intellectual property rights in the digital era. Copyright owners must have recourse against entities like Respondents, whose business is directed at enabling and facilitating the theft of private property.

SUMMARY OF ARGUMENT

1. The Copyright Clause of the United States Constitution reflects the Framers' understanding that "the Progress of Science and useful Arts" is best advanced by protecting the rights of individuals in their intellectual property. Ensuring that artists, authors and composers are able to secure the financial benefits of their labors preserves the incentive to create original works that may be enjoyed by people throughout the world.

2. Contributory copyright infringement is a common-law doctrine rooted in longstanding principles of joint tort liability. Since at least the nineteenth century, individuals

have been subject to liability in circumstances where they assist or encourage the act resulting in injury. In the context of copyright infringement, persons who knowingly assist or encourage unlawful copying have been deemed contributory infringers. Cases in which a person sells a product or service that can be used to infringe present a closer question. In *Sony*, the Court analyzed the problem by drawing upon the "staple article of commerce" doctrine from patent law, concluding that selling the Sony Betamax did not constitute contributory infringement because it was "principally" used for a noninfringing purpose. 464 U.S. at 421.

3. The decision below misapplies *Sony* in two ways. *First*, it interprets *Sony* as protecting those who, like Respondents, actively encourage and facilitate copyright infringement. Unlike the defendants in *Sony*, Respondents have done far more than simply release into the stream of commerce a product that can be used to infringe. Rather, Respondents have launched a scheme with the primary purpose of assisting infringement; any lawful use of their services is an incidental byproduct. *Second*, the decision below misapplies *Sony* by asking whether the product has *any* noninfringing use. In the context of peer-to-peer file sharing networks, the answer will always be yes, given that the networks can be used to transmit noncopyrighted works (or copyrighted works that are transmitted with the author's consent or permission). The Ninth Circuit's absolutist approach is inconsistent with settled principles of secondary liability, and renders the contributory infringement doctrine a virtual dead letter if the defendant can conjure up some theoretical legitimate use for its product.

4. This Court should reaffirm and clarify the approach it took in *Sony* by focusing on Respondents' conduct in designing their services, luring in new participants, and operating their business in a way specifically designed to maximize the amount of illegal copying. Only if this Court concludes that this conduct is not by itself sufficient to support liability for contributory infringement, should it balance the actual noninfringing uses of the product against the infringing uses. This

type of approach is consistent with the common law of secondary liability, and will help strike an appropriate balance between encouraging the use and development of new technologies, while respecting and preserving the intellectual property rights of copyright owners.

ARGUMENT

I. THE FRAMERS RECOGNIZED THAT "PROGRESS" IN THE CREATIVE ARTS DEPENDS ON PROTECTING INTELLECTUAL PROPERTY RIGHTS.

The Framers recognized that private property rights are at the core of a free and prosperous society. The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." The Copyright Clause, U.S. CONST., art. I, § 8, cl. 8, extends special protection to intellectual property, empowering Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

This "constitutional command," *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6 (1966), reflects and incorporates the principle that the creative arts are best advanced through a strong system of copyright that preserves the financial incentive for writers, authors and composers to create original works. As this Court has explained, "[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

The Court elaborated on this principle in *Eldred v. Ashcroft*, where it stated that "'copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public

benefit by resulting in the proliferation of knowledge. . . . The profit motive is the engine that ensures the progress of science.'" 537 U.S. 186, 212 n.18 (2003) (quoting *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y. 1992), *aff'd*, 60 F.3d 913 (2d Cir. 1994)). "Rewarding authors for their creative labor and 'promot[ing] . . . Progress' are thus complementary; as James Madison observed, in copyright '[t]he public good fully coincides . . . with the claims of individuals.'" *Eldred*, 537 U.S. at 212 n.18 (quoting The Federalist No. 43, p. 272 (C. Rossiter ed. 1961)). In this way, "copyright law serves public ends by providing individuals with an incentive to pursue private ones." *Eldred*, 537 U.S. at 212 n.18.

Preserving a strong system of "enforceable rights" in intellectual property thus "afford[s] greater encouragement to the production of [creative] works of lasting benefit to the world." *Washingtonian Pub. Co. v. Pearson*, 306 U.S. 30, 36 (1939) (quotation omitted).

II. THE DOCTRINE OF CONTRIBUTORY COPYRIGHT INFRINGEMENT IS GUIDED BY COMMON-LAW PRINCIPLES OF SECONDARY LIABILITY.

"The Copyright Act does not expressly render anyone liable for infringement committed by another." *Sony*, 464 U.S. at 434. Culpable parties "who have not themselves engaged in infringing activity," *id.* at 435, may nevertheless be held secondarily liable pursuant to "principles recognized in every part of the law." *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 63 (1911). Thus, contributory copyright infringement is fundamentally a common-law doctrine—"merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another." *Sony*, 464 U.S. at 435.

A. At Common Law, Secondary Liability Attached To Those Who Assisted Or Encouraged Wrongful Acts.

By the early seventeenth century, it was recognized that when multiple parties act in concert to commit a tort, "all coming to do an unlawful act, and of one party, the act of one is the act of all of the same party being present." *Sir John Heydon's Case*, 77 Eng. Rep. 1150, 1151 (1613). Over the course of nearly four centuries, the common law of joint liability has identified and refined the various circumstances in which parties can be said to be "acting in concert." The principle is now broad enough to encompass "[a]ll those who, in pursuit of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit." W. Page Keeton *et al.*, *Prosser & Keeton on the Law of Torts*, § 46 at 323 (5th ed. 1984) (footnotes omitted).

As the *Restatement* explains, a defendant may be held liable "[f]or the harm resulting to a third person from the tortious conduct of another" when the defendant "knows that the other's conduct constitutes a breach of duty and gives substantial encouragement or assistance to the other so to conduct himself." *Restatement (Second) of Torts* § 876(b) (1979). In such cases, secondary liability is just, because the secondarily liable party has allied itself with the tortfeasor and encouraged or assisted the tortfeasor in accomplishing his aims, thereby making itself equally morally culpable.

Common-law courts have long applied these principles in civil tort cases. For example, in *Daingerfield v. Thompson*, 74 Va. 136 (1880), the Supreme Court of Appeals of Virginia found that offering mere words of encouragement could provide the basis for liability, holding that because the defendant had "advised and instigated" the unlawful act, he could be held civilly liable as "the aider and abettor" and "must take the consequences of the result." The Supreme Judicial Court of Massachusetts applied a similar test, holding that "any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances or approves the same, is in law deemed to be an aider and abettor, and liable as principal." *Brown v. Perkins*, 83 Mass. 89, 98 (1861). *See also Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 251 (4th Cir. 1997) (publisher of a manual for contract killers can be subject to common-law tort liability for aiding and abetting the wrongful death of a murder victim whose killer had followed the manual's instructions).[2]

B. Those Who Assist Or Encourage Copyright Infringement Can Be Held Liable As Contributory Infringers.

The doctrine of contributory copyright infringement emerged from these common-law principles in the second half of the nineteenth century. In 1886, a defendant was found liable for contributory infringement when he sold a printing plate from the plaintiff's illustrated newspaper to a competing illustrated newspaper, which then printed and published the material on the printing plate without the plaintiff's permission. *Harper v. Shoppell*, 28 F. 613 (C.C.S.D.N.Y. 1886). The court held that because the defendant "kn[ew] at the time of selling the plate" that it would be used to infringe the plaintiff's copyright, the defendant "occupies the position of a party acting in concert with the purchaser who printed and published it, and is responsible with him as a joint tort-feasor." *Id.* at 615.

Twenty-five years after *Harper*, this Court found the principle of contributory copyright infringement so unexceptional that it pronounced it consonant with "principles recognized in every part of the law." *Kalem Co.*, 222 U.S. at 63.

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[2] The federal criminal code, 18 U.S.C. § 2(a), also provides for aiding-and-abetting liability: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

In *Gershwin Publishing Corp. v. Columbia Artists Management*, the Second Circuit penned the formulation of the doctrine that remains the most-quoted standard today, applying contributory infringement liability to anyone "who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted); *see also* Paul Goldstein, *Copyright* § 6.1 at 705 & n.2 (2d ed. 1990). In short, "the law allows a copyright holder to sue a contributor to the infringement . . . in effect as an aider and abettor." *In re Aimster Copyright Litig.*, 334 F.3d 643, 645-46 (7th Cir. 2003).

Although the aiding-and-abetting standard was simple enough to apply when the defendant supervised or directly participated in the infringement, it was not as useful in resolving what Justice Holmes pointedly called the "nice questions" that arise in situations where the defendant does no more than provide the materials or equipment used in the infringement. *Kalem Co.*, 222 U.S. at 62. In "cases where an ordinary article of commerce is sold," it can be difficult to identify the point at which "the seller becomes an accomplice in a subsequent illegal use by the buyer." *Id.*

The Court confronted this question in *Sony*, where it emphasized that "the contributory infringement doctrine is grounded on the recognition that adequate protection [of the copyright owner's exclusive rights] may require the courts to look beyond actual duplication of a device or publication to the products or activities that make such duplication possible." 464 U.S. at 442. Drawing upon the staple article of commerce doctrine in patent law, it held that because the Sony Betamax was "widely used for legitimate unobjectionable purposes" and "capable of commercially significant noninfringing uses," the defendants could not be held liable for contributory infringement. *Id.*

III. THE NINTH CIRCUIT'S APPROACH MISAPPLIES *SONY* AND DEPARTS FROM THE COMMON-LAW UNDERSTANDING OF CONTRIBUTORY INFRINGEMENT.

The Ninth Circuit held that Respondents were not liable for contributory infringement because they did not have knowledge of the infringement. The court reasoned that absent proof that the defendant had "reasonable knowledge of specific infringing files and failed to act on that knowledge to prevent infringement," it could not be held liable for contributory infringement as long as its product or service "is *capable* of substantial or commercially significant noninfringing uses." Pet. App. 10a-12a (emphasis added).

This approach cannot be reconciled with the common-law authorities discussed above and is inconsistent with this Court's holding in *Sony*. Here, there is no dispute that illegal copying constitutes more than 90 percent of the traffic on Respondents' networks. Nor is there any dispute that Respondents are aware of this infringement and that they directly profit from this infringement. Indeed, Respondents carefully designed their products to *facilitate* copyright infringement—and have carefully avoided taking any steps to curtail the illegal activity their products have generated.

This is a classic case of aiding and abetting illegal conduct. Respondents have enabled, encouraged and profited from the infringement and should be held contributorily liable under ordinary common-law principles of secondary liability. *See* Keeton *et al.*, *Prosser & Keeton on the Law of Torts*, § 46 at 323 (secondary liability encompasses "[a]ll those who, in pursuit of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit"). As parties that assisted, encouraged and benefited from the tortious conduct, Respondents are morally culpable and should be deemed liable for the resulting harm.

The Ninth Circuit has adopted an absolutist approach to secondary liability arising from the sale of a product: provided the defendant can show that its product is "capable" of *some* noninfringing use, contributory liability will not lie (absent a heightened showing of knowledge of specific infringements and failure to act—a showing that the Ninth Circuit has made virtually impossible to satisfy). This approach is in direct conflict with *Sony* because it ignores Respondents' conduct in implementing a business plan aimed at facilitating copyright infringement, and further because it misapplies *Sony*'s balancing test.

A. Respondents' Conduct In Designing, Marketing, And Supporting Their Networks Renders Them Liable For Aiding And Abetting Copyright Infringement.

Sony was a case where the defendants did no more than place a product into the stream of commerce that could be used to infringe copyrights. This case, in contrast, involves defendants who have taken affirmative steps to assist and encourage people to use their products to infringe copyrights. Among other things, Respondents have intentionally configured their services to facilitate the illegal copying of files containing music, movies and software—while at the same time deliberately limiting their own ability to prevent the copying of copyrighted works. Indeed, Respondents' "help desk" actually *instructs* users on how to transfer specific copyrighted works. Respondents have also launched a marketing campaign aimed at luring former Napster users. These individuals are targeted for the sole reason that they have demonstrated an interest in obtaining music and movies illegally. To top it off, Respondents aggressively and falsely proclaim that their services are legal, thus inducing their customers—including millions of children—into lawbreaking.

This course of conduct amounts to aiding and abetting copyright infringement—*regardless* of whether Respondents' services have a commercially significant use. As the Second Circuit has explained, there are *two* general categories of activities that lead to contributory liability: "(i) personal conduct that encourages or assists the infringement; and (ii) provision of machinery or goods that facilitate the infringement." *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 693, 706 (2d Cir. 1998); *accord Nimmer on Copyright* at § 12-79 (stating that "personal conduct that forms part of or furthers the infringement" and "contribution of machinery or goods that provide the means to infringe" are separate bases for contributory liability). The Ninth Circuit erred by declining to hold Respondents liable on the basis of their personal conduct—namely, their design, marketing and ongoing technical support efforts—all of which demonstrate a clear intent and deliberate purpose of assisting the infringement of copyrighted works.

B. Respondents Are Contributorily Liable For Distributing A Product That They Know Is Overwhelmingly Used For Infringement.

The Ninth Circuit further erred by refusing to impose contributory liability on the basis of Respondents' "provision of machinery or goods that facilitate the infringement." *Matthew Bender*, 158 F.3d at 706. Even if Respondents could somehow be deemed not to have engaged in personal conduct that furthered the infringement, they should have been held liable for providing the goods that facilitated it. In concluding otherwise, the Ninth Circuit misapplied *Sony*'s balancing test for determining when the provision of a good or service used to infringe can lead to contributory liability.

In *Sony*, the Court sought to "strike a balance between the copyright holder's legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce." 464 U.S. at 442; *see also Aimster*, 334 F.3d at 649 (noting the "Court's action in striking the cost-benefit tradeoff in favor of Sony"). The Court found that "millions of owners" of video recorders used the devices for the noninfringing use of time-shifting—recording a program in order to watch it at a later time—and that "the business

supplying the equipment that makes such copying feasible should not be stifled simply because the equipment is used by some individuals to make unauthorized reproductions of [copyrighted] works." *Sony*, 464 U.S. at 446. Indeed, time-shifting was the "primary" and "principal[]" use for the "average member of the public us[ing] a [video recorder]." *Id.* at 421, 423. The noninfringing time-shifting use by "millions" thus outweighed the infringing library-building use of "some individuals." Here, of course, it is undisputed that Respondents' services are used *overwhelmingly* to violate the rights of copyright owners and steal their property. Accordingly, in this case the balance tilts heavily in favor of the copyright owners.

The Ninth Circuit's absolutist approach grossly underprotects intellectual property rights. As long as there is a public domain of noncopyrighted (or uncopyrightable) works, virtually every copying device placed into the stream of commerce will be "capable" of noninfringing uses, and copyright owners will be helpless to prevent the sort of large-scale, systematic misappropriation of their property by entities such as Respondents, whose entire business is predicated on the theft of copyrighted works.

C. This Court Should Reaffirm And Clarify *Sony*'s Balanced Approach To Contributory Infringement.

In *Sony*, this Court found a way to balance the development of new technologies with our constitutional commitment to protect and defend copyrights. The Court should apply the same approach here by reaffirming and clarifying that traditional common-law principles of secondary liability fully apply to on-line services that encourage and facilitate the illegal reproduction of copyrighted works.

This Court should make clear that *Sony* does not offer a safe harbor for individuals and businesses, such as Respondents, who aid and abet infringement by deliberately pursuing a course of conduct intended to facilitate illegal copying. As shown above, Respondents' design, marketing and support activities directly assist infringers, and generate profits for Respondents as a result of the infringements. These facts establish Respondents' moral culpability and illustrate that their conduct is different in kind than the conduct of the manufacturers of the video recorders in *Sony*. *Cf.* 464 U.S. at 438 (noting trial court finding that defendants' conduct, including their advertising, was not aimed at encouraging or assisting infringement).

This Court should also reject the Ninth Circuit's application of *Sony*'s balancing test, and clarify that the balancing test requires weighing the relative magnitude of the legal uses of Respondents' services against the illegal uses. This was the general approach followed in *Aimster*. There, the Seventh Circuit, in an opinion by Judge Posner, held that when "substantial noninfringing uses, present or prospective, are demonstrated," courts should make "some estimate of the respective magnitudes of these uses" and engage in a "balancing of costs and benefits." 334 F.3d at 649.

A test that balances the interests at stake will not diminish the incentive for legitimate innovation or hamper the creation of new technologies. To the contrary, a balancing approach will permit legitimate technologies that benefit the public to flourish, while at the same time respecting the intellectual property rights of copyright owners—a value the Framers deemed to be of constitutional importance in protecting the creative process.

The irony in this case is that Respondents are victimizing the very people whose creativity drives and sustains their business. The law should not protect those who have built a business based on the unjust exploitation of property owned by another, and who continue to profit while disclaiming any responsibility for the immense harm that is the expected and intended consequence of their conduct.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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